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OUR ANCIENT AND SENSIBLE CONSTITUTION. PROFESSOR CROSSKEY'S VIEW

EMERGING from the obscurity which has gathered around it during the years since 1789 and concealed its real meaning, the Constitution stands revealed by Professor Crosskey¹ in its original clarity and vigor. This magnificent accomplishment of legal scholarship is not to be dismissed as just another book about the Constitution. If Professor Crosskey is wrong, he must be refuted. If he is right, it would seem to be almost impossible to exaggerate the importance of his work. Right or wrong, Professor Crosskey must now be reckoned with by all who are concerned with constitutional law, that is to say, everybody in the country, Congress, the President, the Supreme Court, teachers, judges, lawyers, citizens. Perhaps it would not be too far wrong to say that there is a grave moral responsibility imposed upon all those who have sworn to uphold the Constitution to become familiar with what Professor Crosskey has disclosed as to the meaning of that great instrument. Significantly, the book is dedicated "To the Congress of the United States in the hope

¹ POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES. By William Winslow Crosskey, Professor of Law, University of Chicago. Chicago: The University of Chicago Press, 1953. Two Volumes. Pp. xi, viii, 1410. \$20.00.

that it may be led to claim and exercise for the common good of the country the powers justly belonging to it under the Constitution.”²

The real meaning of the Constitution, as expounded by Professor Crosskey, is so radically different from the interpretations now current that at first sight it appears fantastic and incredible. The author, of course, is aware of this fact, and, no doubt, he fully expects to be roundly denounced and abused by persons of various political views, for his book is no party document and follows no party line. Denunciation, however, will prove ineffective as an answer to the conclusions announced by the author, because these conclusions are based on evidence, an overwhelming mass of evidence, that the industry and acumen of the author has assembled and presented for all to see and to weigh. In the preface to the two stout volumes now published we are told that they:³

... are the first fruit of more than thirteen years' research into the origins and intended character of the Government of the United States and, likewise, into the many vicissitudes through which that government has passed in the one hundred and sixty-one years since its establishment.

The magnitude of the research involved in the preparation of these first two volumes of the projected work is abundantly manifest upon a first reading. Here the reader will find no mere theoretical discussion of what was intended originally by the words of the Constitution. For each clause, even for each word, of the great instrument of government that has been the subject of dispute, we are given documentary evidence as to the use of the words and phrases in question as of the latter part of the eighteenth century in England and America. The materials examined for the purpose of constructing a “dictionary”⁴ of eighteenth-century usage with respect to important words used in the Constitution consist

² CROSSKEY, *op. cit. supra* note 1, at v.

³ *Id.* at vii. The Preface is dated May 1, 1950. No explanation is given as to the almost three-year delay in publication.

⁴ *Id.* at 5.

not only of the writings of prominent men connected with the drafting and ratification of that document, but also many "neutral" writings,⁵ some well-known, such as those of Blackstone, others unknown to fame, such as those of obscure pamphleteers and letter-writers. Literally hundreds of pages of text are devoted to determining the meaning as of 1787 of the key words in the Commerce Clause, namely, "Commerce," "among," "States," and "regulate." All of these words conveyed a somewhat different meaning to the eighteenth-century American from what they convey to us today, but the word in this series which has changed the most is "States." We think of a "State" as a geographical unit, a certain territorial division. Such was not the primary eighteenth-century notion at all. Where another sense was not specified its ordinary meaning was "*the people* of a state."⁶ Professor Crosskey concludes that under the Constitution Congress has full power to legislate with respect to economic affairs.⁷ He points out the well-nigh intolerable evils which obtain at the present time as a result of the pseudo-orthodox interpretation, which concedes but a fragmentary power to Congress in such matters.⁸ Restrictive conceptions of the commerce power from Marshall's "commerce which concerns more States than one"⁹ to the modern "interstate commerce" are fallacious and should be abandoned. In his own words the author states:¹⁰

⁵ *Id.* at 5-6: "The samples of word-usage and juristic and political discussion, of which [the dictionary] will be built, will, therefore, all be drawn, in the first instance, from sources not connected with the Constitution. For, by using such materials, a dictionary can be made which will not, it is conceived, be open to the many natural suspicions that arise from the known or suspected political bias of speakers and writers on the Constitution."

⁶ *Id.* at 55 *et seq.*

⁷ *Id.* at 292.

⁸ *Id.* at 20 *et seq.*

⁹ *Gibbons v. Ogden*, 9 Wheat. 1, 194 (U.S. 1824), as quoted in CROSSKEY, *op. cit. supra* note 1, at 254: "This famous phrase which the Chief Justice coined, though it has frequently been taken, in modern times, to signify our familiar 'interstate commerce' . . . but its *meaning* was much more extensive. It meant what it literally said: all 'commerce' — that is, all 'commerce' of the internal, or domestic, kind — 'which [*is of interest, or importance, to*] more states than one.'"

¹⁰ CROSSKEY, *op. cit. supra* note 1, at 292.

The laws of Congress in the commercial field could then be complete. Jurisdictional litigation within that field could be eliminated. Simple, uniform, nation-wide laws for the sale of goods, and for the many other commercial matters for which uniform law has so long been desired, could then be enacted. A simple national companies act could replace the vast and needless complexity that now comprises American corporation law. And many other benefits would be possible. Since, then, as we have seen, the one thing standing in the way of these desirable results is the Supreme Court's belief that its own long-held theories were established, not by itself, but by the Commerce Clause; and since it is clear, on the basis of neutral, unsuspect evidence of antecedent usage and political ideas, and likewise on the basis of the understanding of the Commerce Clause current in the early years, that the Supreme Court's belief is unfounded, what good reason there can possibly be for the country's any longer being deprived of the benefits that would flow from the Court's confessing this fact, it is by no means easy to see. And this being true, it would seem to follow that the Court is in duty bound to take this step and thereby get back, at least in its decisions under the Commerce Clause, to the ancient and sensible document it is solemnly sworn to uphold.

Four factors have contributed to bring about the present misconceptions as to the meaning of the Constitution. One of these has been indicated, namely, the changed meaning of words. Another factor is a corresponding change in legal conceptions. These two factors have reinforced "the many attempts that have been made throughout our history to distort the Constitution to serve some political end."¹¹ The fourth factor is "mere prolonged disuse, with the original understandings of 1787 gradually becoming incredible as the period of formation has receded into the mists of history."¹² The author takes these factors into account in his exposition of the Commerce Clause and other important provisions of the Constitution, which will be mentioned in this review.

¹¹ *Id.* at 4.

¹² *Ibid.* The operation of these factors are discussed again and again throughout the book. See Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 366 (1929): "Madison's warning . . . against 'those errors which have their source in the changed meaning of words and phrases. . . .'"

Following his masterful treatment of the Commerce Clause, three other sets of words are more briefly considered by the author and shown to be related to the Commerce Clause. The three matters in question are commonly known as the "Imports and Exports Clause," the "Ex Post Facto Clause" (there are actually two such clauses, one applicable to Congress, the other to the states), and the "Contracts Clause." Readers who are conversant with what is generally called "constitutional law" will acknowledge that these provisions of the Constitution have been interpreted by the Supreme Court so as to have minimal significance. They have been virtually destroyed. It seems fairly obvious that they were originally intended to have considerable significance. Professor Crosskey produces abundant evidence that this surmise is correct.

The first of these clauses reads as follows: ¹³

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws, and the net Produce of all Duties and Imposts, laid by any State on Imports and Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

The author shows that for a proper understanding of this clause the eighteenth-century American meaning of four terms used therein must be determined. He establishes, again by means of copious documentation, that to the eighteenth-century American an "impost" was a tax required to be paid with respect to goods brought in or taken out of a jurisdictional area, that is, the term was practically synonymous with our modern term "duty" ¹⁴ as in the expression "to pay the duty on goods imported from France." On the other hand, to the eighteenth-century American a "duty" was the equivalent of our "excise," ¹⁵ that is, it meant a tax levied not when goods were brought in or taken out of a place, but after they

¹³ U.S. CONST. Art. I, § 10, cl. 2.

¹⁴ CROSSKEY, *op. cit.* *supra* note 1, at 296.

¹⁵ *Ibid.*

had "come to rest," such as an ad valorem levy on goods in a warehouse. "Imports" and "exports" referred to the things brought in or taken out of a place, such as a state or even a town. These terms were not restricted to articles of merchandise transported to or from foreign countries.¹⁶ With these meanings of the key terms in mind it is readily seen that the Imports or Exports Clause was intended to have drastically restricted the taxing power of the states.¹⁷ This was the clause that was to do away with the abuses every American school child has heard about whereby New York, for example, was able to and did prey upon her neighboring states. The Supreme Court, however, has emasculated this provision so that under present pseudo-orthodox theories of constitutional law it is entirely ineffective for such purpose.¹⁸ Every lawyer knows, or is supposed to know that imports and duties are the same thing and that imports and exports are goods coming from or being sent abroad. Something has to be done about state taxation, however. Accordingly the Supreme Court, as every lawyer knows, invokes the Commerce Clause to control the taxing power of the states. Every lawyer knows, or should know, what a mess has been made as a result of this egregious error. The notorious confusion represented by the cases dealing with the supposed limitation on the power of the states with respect to taxation and other matters as a result of some invisible radiation from the Commerce Clause constitutes one of the most spectacular items of the stock in trade of the writers and teachers concerned with taxation and constitutional law. Professor Crosskey's analysis demonstrates the futility of much of the "learning" in this area.¹⁹

¹⁶ *Id.* at 297.

¹⁷ *Id.* at 304: "And if this conclusion seems to cut down the revenue base of the states too much to be credible, final judgment may be reserved, until it is seen more fully, in the chapters to follow, just how restricted the role of the states was to be, in the system of government the Constitution contemplated."

¹⁸ *Id.* at 315.

¹⁹ *Id.* at 321: "The Supreme Court's whole theory, it can thus be seen, is about as plainly unfounded as a theory could be. It has nothing in logic to commend it and, certainly, nothing in results."

What is needed is a correct understanding of what the Constitution actually provides.

The provisions of the Constitution relating to ex post facto laws read as follows: ²⁰

No Bill of Attainder or ex post facto Law shall be passed.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The first of these applies to Congress. The second, which by its terms applies to the states, also contains the Contracts Clause, which is discussed below. Professor Crosskey shows that to the eighteenth-century American an ex post facto law meant any law having a retrospective effect.²¹ It was not limited to laws respecting crimes as was stated by the Supreme Court in *Calder v. Bull*.²² The author sarcastically characterizes this famous case as an act of judicial statesmanship,²³ the sort of thing that is greatly admired by many writers on constitutional law. If the prohibition of ex post facto laws be given its natural meaning, that is, if the Constitution were observed, neither Congress nor the states could pass retroactive laws. George Mason called attention to this fact and opposed the adoption of the Constitution on that ground, as indeed did many others. Mason, however, predicted that emergencies would arise when such a literal interpretation would appear too restrictive on legislative power and then the words would be disregarded. That is exactly what happened.²⁴ The country was in the grip of a depression in business affairs at the time of the decision in *Calder v. Bull*. Robert Morris, known to every American schoolchild as the

²⁰ U.S. CONST. Art. I, § 9, cl. 3; *Id.* at § 10, cl. 1.

²¹ CROSSKEY, *op. cit.* *supra* note 1, at 324 *et seq.*

²² 3 Dall. 386 (U.S. 1798).

²³ CROSSKEY, *op. cit.* *supra* note 1, at 342 *et seq.*

²⁴ *Id.* at 324-5.

"financier of the Revolution," at one time considered among the richest men in America, a "Founding Father," a former senator, was unable to pay a comparatively small debt, and was languishing in a debtors' prison.²⁵ Many others were in like circumstances, including James Wilson, another "Founding Father," Justice of the Supreme Court, who, however, managed to escape the clutches of his creditors by fleeing from Philadelphia, but who died in misery of spirit.²⁶ Congress had not as yet enacted a bankruptcy law. If the ex post facto language of the Constitution were observed, Congress would not have the power to enact a bankruptcy law with retroactive effect so as to provide relief for Morris, Wilson, and many other highly respectable and deserving citizens. Accordingly, Justices Chase, Iredell and Paterson managed to torpedo the ex post facto language. The alleged reasons for their action, swallowed whole by learned men ever since, are shown by Professor Crosskey to be spurious. Here is a fine beginning for judicial statesmanship. Two years later, in 1800, Congress passed a bankruptcy law with retroactive effect. For practical purposes the ex post facto prohibitions of the Constitution have been dead letters ever since.²⁷

The Contracts Clause has not fared much better at the hands of the Supreme Court. If this provision were interpreted literally, as Professor Crosskey shows it was meant to be, no state could cut down the period of limitation with respect to the bringing of actions on a contract, nor could it, for example, increase the application of the Statute of Frauds. In fact, under the Constitution the states are practically powerless to decrease the obligation of any contract.²⁸ The interpretation sanctified in *Ogden v. Saunders*²⁹ is an ex-

²⁵ *Id.* at 348.

²⁶ *Id.* at 349.

²⁷ *Id.* at 351: "The 'error' of the case has, nevertheless, persisted; and the Ex-post-facto Clauses, at the present day, are completely meaningless, except for a purpose for which they were hardly needed."

²⁸ *Id.* at 354.

²⁹ 12 Wheat. 213 (U.S. 1827).

ample of "juristic metaphysics."³⁰ Professor Crosskey shows the absurdity of this interpretation (which, it will be recalled, restricts the prohibition to the impairment of obligations of contracts already in existence) by an appeal to ordinary English usage — both that of the eighteenth century and that of today. The plain meaning of words has been distorted by the Court. The bearing of all this discussion on the Commerce power of Congress should now emerge. Congress is not prohibited by the Constitution to impair the obligation of contracts. Indeed, under the Commerce power it has a positive grant to do so. The states were not to meddle in such affairs.³¹

The reader of the preceding woefully inadequate summary of Professor Crosskey's exposition of the Commerce power and related matters should go to the text itself to appreciate the compelling documentation for the positions taken there. Perhaps even more impressive than the documentation, however, are Professor Crosskey's magisterial and truly lawyer-like analyses of the materials and his bringing them together so that they have a cumulative effect on the reader. He shows again and again how his interpretation of one clause confirms his interpretation of another. He brings out the consistency of the Constitution in all its parts, provided it be read aright. It is hoped that this consistency of meaning will become more apparent after a consideration is given to the other provisions of the Constitution covered by Professor Crosskey in these first two volumes of his great work.

The examination of the Commerce power of Congress and related matters previously discussed is but the first movement

³⁰ CROSSKEY, *op. cit. supra* note 1, at 353.

³¹ *Id.* at 359-360: "As originally drawn, and as the clause still reads, there can be no doubt whatever that it has the meaning set forth in these pages. That meaning was intended. State power over contracts was deliberately voted down. And that means that a national intrastate commerce power, and as well, of course, full commercial power in other fields, must have been intended to exist. In short, it is oblique internal evidence of a most cogent kind that the view here taken of the national commerce power, in the earlier pages of this book, is correct."

of the great symphony, which continues with a profound discourse on the national governing powers. For comprehension of what the Constitution actually provides in this regard it is necessary to have some knowledge of eighteenth-century canons of interpretation and methods of draftsmanship. The canons of interpretation from Plowden to Blackstone are carefully considered and their application to the Constitution as a whole are shown.³² Only the most striking results can be related here. Perhaps the most arresting of these is the enhanced importance the eighteenth-century rules give to the Preamble.³³ Another is the proper construction to be given general language which is succeeded in a writing by an enumeration of particular matters included in the general language. This scheme is, of course, exemplified in the first three articles of the Constitution. The author points out that the Supreme Court has applied the eighteenth-century rules to Article II and Article III, but has refused to do so with respect to Article I,³⁴ in spite of the fact that Article I contains what was known in the eighteenth century as the "sweeping clause," which reads as follows:³⁵

[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.* [Emphasis supplied.]

³² *Id.* at 363 *et seq.* Chapter XIII is entitled: "The Scheme of Draftsmanship of the Constitution, in the Light of the Accepted Rules of Interpretation of the Eighteenth Century."

³³ *Id.* at 370: "The Preamble—Fisher Ames, Elias Boudinot, and John Lawrence, all insisted—was an important and operative part of the document; and on the basis of the purposes of the Government therein recited, Congress—in the words of Ames, with which the others agreed—had 'authority over *all* objects of national concern,' or importance." Today the importance of the Preamble and preambles in general is minimized. In fact the celebrated Roscoe Pound has expressed a hostile attitude towards preambles. See Pound, *The Development of Constitutional Guarantees of Liberty*, 20 NOTRE DAME LAW. 183, 214 (1945). His attitude is probably representative of that of many others in the legal profession.

³⁴ *Myers v. United States*, 272 U.S. 52 (1926), with respect to the executive power, and *Kansas v. Colorado*, 206 U.S. 46 (1907), with respect to the judicial power.

³⁵ U.S. CONST. ART. I, § 8, cl. 18.

The Constitution rightly understood makes clear that Congress has *all* the legislative power granted therein rather than *only* the legislative power granted therein. These logically tautological expressions are of quite different meaning as a matter of emphasis.³⁶ It should be noted that the Constitution uses *all* not *only*. These considerations become important for an understanding of the true meaning of the first clause of Article I, Section 8:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States

We have all been taught to believe that this clause provides only for a taxing and spending power but not for a substantive power to provide for the common defense and general welfare of the country. According to Professor Crosskey, this traditional view is clearly erroneous. He takes many pages to show why this is so and why the correct view is that there can be no reasonable doubt that the clause was, in fact, intended in its substantive sense.³⁷ He ably refutes the stock arguments against such an interpretation. The punctuation argument he dismisses rather summarily, as it, no doubt,

³⁶ CROSSKEY, *op. cit. supra* note 1, at 390: "That the Supreme Court's mistaking the 'spirit' and 'intention' of the introductory words of the article on Congress was not, by any means, an inconsequential thing is further indicated by its having blinded the Court completely, in *Kansas v. Colorado*, to the 'literal' meaning of the last paragraph of the eighth section of that article; the provision, that is, which sweeps into the possession of Congress, in the clearest terms, *all* the national 'law-making' powers; and this, whether those powers are 'mentioned and defined' in the article on Congress, or not. The Court's mistake about the 'spirit' and 'intention' of the Legislative Article—first made, of course, long before this case of 1906—has also had many other most unfortunate results. For the mistaken belief in a jealous, chary grant of legislative power has undoubtedly been a factor, and an important factor, in the failure of the Court, and the profession generally, to perceive the plain meaning of the various specific grants of Congressional power; such grants, for example, as that of the power 'to regulate Commerce among the several States'; the power to legislate generally in that troublesome field, the conflict of laws; and the power, broad and important, which Congress undoubtedly has, to regulate the constitutions of our several states, to the end of keeping those local and subordinate governments really republican in character."

³⁷ *Id.* at 401.

merits little consideration.³⁸ Nevertheless he considers it and answers it. The enumeration argument and the position argument require very extended consideration. An elaborate study of the enumerated powers has been undertaken, the upshot of which may be briefly summarized as follows:³⁹ Many of these powers appeared as powers of Congress under the Articles of Confederation. These were repeated in the new instrument of government out of an abundance of caution. Every lawyer will recognize the reasonableness of this procedure. But more important for a correct understanding of the Constitution are other enumerated powers, which, under eighteenth-century notions, were traditionally considered as executive powers. Professor Crosskey makes the point that the framers of the Constitution were particularly anxious to see to it that the President under the new Constitution would not be in a position to claim the prerogative powers of the British King. They saw to it that many of the traditional executive powers as set forth in Blackstone's *Commentaries* were to be in the hands of Congress and not the President. Their concern was not with what powers Congress should have as against the states. Again and again the author emphasizes this important fact. The enumerated powers of Congress that are not accounted for by reason of the foregoing considerations are explained as being stated for the purpose of providing a limitation on what would otherwise be an unlimited power. As for the position of the Common Defense and General Welfare clauses in the middle of the provisions respecting taxes there is also extended discussion. The well-known importance of the taxing power to the new government seems to be the principal reason for its position at the head of the list. Professor Crosskey also emphasises the peculiar character of the taxing power in the minds of eighteenth-century Americans. He also disposes of

³⁸ *Id.* at 394.

³⁹ The sketchy summary which follows is an attempted condensation of two long chapters: Chapters XV and XVI.

the position of the proviso at the end of the first paragraph of Article I, Section 8 as a not unusual phenomenon of eighteenth-century draftsmanship.

After explaining in detail what the general legislative power of Congress under the Constitution is, as contrasted with the distorted views that have come to be traditional,⁴⁰ the author takes up the judiciary article. Again he presents a wealth of eighteenth-century background material which is necessary for grasping what is really set forth in the Constitution with respect to the judicial power of the United States.⁴¹ Here the reader will find an excellent account of the jurisprudential ideas of the eighteenth-century. Natural Law and the law of nations, of course, require consideration. This background material and the discussion of the judiciary article in the latter part of the first volume⁴² are of special interest to the legal profession. At the time of the drafting of the Constitution and for a considerable period thereafter the general notion was that the common law was really a common law. Our modern American idea that each state in the union has its own common law was unknown. This modern notion would never have become the accepted view if the Constitution were enforced as it is written. The courts of the United States, particularly the Supreme Court, would see to it that justice be established throughout the length and breadth of the land according to one national system. That this result was intended is made abundantly clear by the author in this portion of the book. The broad and sweeping

⁴⁰ See Chapter XVII, entitled "The Totality of Congressional Authority as Here Presented, and as Generally Conceived."

⁴¹ See Chapter XVIII, entitled "Eighteenth-Century 'General Jurisprudence' and 'the Common Law'."

⁴² See Chapters XIX, XX and XXI, entitled, respectively, "'The Common Law' and the Administration of Justice in Eighteenth-Century America"; "The National Judicial Powers under an Eighteenth-Century Interpretation: Herein of the Supreme Court's Judicial Supremacy and the Common-Law Jurisdiction of the Courts of the United States"; "The National Judicial Powers under an Eighteenth-Century Interpretation: Herein of These Powers with the Second Category of 'Cases' Minimally Taken."

judicial power parallels and confirms his interpretation of the general legislative power of Congress.

The first volume concludes with an analysis of the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁴³

This discussion is necessary at this particular point in the book, which deals with the general powers of the national government, because, as every schoolchild knows, the Tenth Amendment is everlastingly invoked by States' Rights propagandists as a limitation on the powers of the national government. As the author himself says:⁴⁴

... this amendment is nowadays generally supposed to make impossible the existence of general national legislative authority in Congress, and general judicial power in the courts of the United States.

Again the meaning of key words has to be established. The two words which require special study are "delegated" and "reserved." The first had a meaning in the eighteenth century which is now obsolete, namely, to "alienate" or "convey." Professor Crosskey shows how it was used by Blackstone in comparable contexts.⁴⁵ "Reserved" had the same legal meaning in the eighteenth century that it has today.⁴⁶ A reserved power or privilege comes into existence at the time of a grant. Another important part of the language used in the amendment is at the end, where the punctuation, according to eighteenth-century practice, shows that "to the people" is in apposition with "to the States." Again "States" means the people, not the local legislatures.⁴⁷ What then is the meaning

⁴³ U.S. CONST. AMEND. X. See Chapter XXII, entitled "The Tenth Amendment and the National Powers."

⁴⁴ CROSSKEY, *op. cit. supra* note 1, at 675.

⁴⁵ *Id.* at 698 *et seq.*

⁴⁶ *Id.* at 701 *et seq.*

⁴⁷ *Id.* at 705-6: "The States respectively' and 'the people,' in the Tenth Amendment, do not, therefore, signify different persons, as has sometimes been supposed; they signify the same persons; and the persons they signify are 'the People of the United States' *respectively*, of the general granting clause in the Preamble. The

of the amendment? It is simply declaratory of existing law. That it was so understood in Congress and out at the time of its adoption is established by the evidence Professor Crosskey brings forward. He concludes his treatment of the Tenth Amendment as follows: ⁴⁸

Merely on the basis of contemporaneous usage, the interpretation here suggested is, therefore, a reasonable interpretation; and there are, as we have seen, many corroboratory considerations. Thus, it is the only interpretation that accounts for the shift from "retains," in the Articles, to "reserved," in the Tenth Amendment. It is the only interpretation consistent with the pointedly complete omission from the amendment, of any statement about state "sovereignty," such as the antecedent analogous provision of the Articles contained; and it is the only one consistent with the sweeping provision for national sovereignty, or "supremacy," which is found in Article VI of the Constitution. . . . In short, it is a meaning of the Tenth Amendment which completely fits its words and all the other known facts; and the virtual certainty would seem to be that it is what the Tenth Amendment was drawn, and originally understood, to mean. And this being true, it is clear the amendment in no way impugns the conclusions previously reached, as to the generality of the powers of Congress, and of those of our national courts, under the Constitution. Instead, the amendment confirms them.

The regular textual portion of the second volume relates mainly to the function of the Supreme Court under the Constitution as contrasted with its role in history. The author again puts before the reader cogent evidence that at the beginning of our history under the Constitution there was

meaning of the amendment is *not*, then, that a 'reservation' of powers is made *either* 'to the States respectively *or* to the people,' understanding 'the States respectively' and 'the people,' in divergent senses. The Tenth Amendment is not punctuated to convey such a thought, and the word 'either' is not one the amendment contains. An indeterminate, alternative 'reservation' of this kind would, moreover, be essentially meaningless; for there would be no way, under such a 'reservation,' to tell *what* is 'reserved,' by 'the supreme Law,' *to whom*. This consideration, in itself, seems enough to condemn the usual view, and enough to make clear that the 'reservation' was made 'to the States respectively'; *that is to say*, 'to the people.' The two phrases, in short, were used in opposition in the amendment and are so punctuated in it. This view, it will be perceived, reduces everything to order; it accords with the shift from 'retains' to 'reserved'; and there can be no reasonable doubt it is what was intended."

⁴⁸ *Id.* at 708.

general recognition of the Supreme Court as really being the supreme court, that is, the juridical head of the nation.⁴⁹ In this connection the author provides an elaborate study of the background of the case of *Huidekoper's Lessee v. Douglass*.⁵⁰ He states: ⁵¹

It involved the meaning of a statute the Pennsylvania legislature had passed, on the 3d of April, 1792, "for the sale of the [state's] vacant lands"; particularly, those "lying north and west of the rivers Ohio and Allegheny, and Conewango creek," in the general northwest area of the state, sometimes called "the West Allegheny," of which the town of Meadville later became the center. This statute had been interpreted earlier by the Pennsylvania courts, in a manner contrary to that in which the United States Supreme Court interpreted it; and since no Constitutional limitation was involved in the case, other than those implied in the Supreme Court's supreme juridical position, it can be seen at once that the question of the Court's judicial supremacy was presented in the case, in circumstances which, most lawyers would probably agree, were of the kind least favorable to its recognition.

Professor Crosskey subsequently takes up the theme of the attacks on the national judiciary by the Jeffersonians.⁵² His account of the Alien and Sedition laws, midnight judges and the rest, is quite different from what is usually told today.⁵³ A culmination of the Jeffersonian assault as regards constitutional law was the decision in the *Hudson and Goodwin* case,⁵⁴ which receives thorough treatment by the author. This case established "the great and destructive principle"⁵⁵ that there is no national common law of crimes. A number of other famous early cases have new light shed upon them in this part of the book, but for the sake of brevity, only the last of the series will be mentioned here. This is the case of *Green*

⁴⁹ See Chapter XXIII, entitled "The Initial Recognition of the Supreme Court's Position as the Nation's Juridical Head."

⁵⁰ 3 Cranch 1 (U.S. 1805).

⁵¹ CROSSKEY, *op. cit. supra* note 1, at 719.

⁵² *Id.* at 754.

⁵³ *Id.* at 760.

⁵⁴ *United States v. Hudson and Goodwin*, 7 Cranch 32 (U.S. 1812).

⁵⁵ CROSSKEY, *op. cit. supra* note 1, at 783.

v. Lessee of Neal,⁵⁶ wherein "the Court, in 1832, deliberately abdicated its Constitutionally conferred powers with respect to all state written law whatsoever."⁵⁷

All lawyers, whatever their special interests may be, will find Chapters XXV and XXVI of the book close to their hearts. They recount the history of "The Supreme Court's Loss of Supremacy with Respect to State Law and Common Law: Herein of the Rise of the Theory of Two Independent Judiciaries without a Common Head" and "of the Subordination of the National Courts to the State Judiciaries." Here is a long but fascinating (as well as tragic) story, impossible to summarize in a few words. Some of it is familiar, but Professor Crosskey's account is refreshingly different in many respects from what has been presented by others. The most important episode must be mentioned. This is the decision of the Supreme Court in *Erie R.R. v. Tompkins*.⁵⁸ The historical background of this famous decision is, of course, thoroughly explored, and the author pays his respects to John Chipman Gray,⁵⁹ Justice Holmes,⁶⁰ and others in the course

⁵⁶ 6 Pet. 291 (U.S. 1832).

⁵⁷ CROSSKEY, *op. cit. supra* note 1, at 816.

⁵⁸ 304 U.S. 64 (1938).

⁵⁹ CROSSKEY, *op. cit. supra* note 1, at 904-5: "But, at last, in 1909, the late John Chipman Gray, a professor in the Harvard Law School, well known as an expert on certain narrow and esoteric branches of property law, published a book entitled *The Nature and Sources of the Law*. In it, he took issue with what he described as the out-of-date, eighteenth-century, Blackstonian theory, that a judicial decision considered as a precedent, is evidence of what the law is, but not itself the law; he attacked, too, the view of a contemporary American writer, that judges, in deciding cases, merely discover the law; and he presented, instead, as the only correct view, the theory that the judges make the law, both statutory and non-statutory, by their decisions; that they make the non-statutory law by their decisions as to what the Common Law is, and the statutory law by their decision as to what the acts of their legislature mean. And since 'the laws of the several states,' both written and unwritten, were made—so he insisted—and, in the nature of the case (as he conceived it), could only be made, by the courts of the states, the Supreme Court of the United States was guilty, he thought, of a very obvious and regrettable error in not following, and in not compelling the lower national courts to follow, the decisions of the state courts, as absolutely binding precedents on all points of Common Law and state statutory law, that came before them. . . . The contrary practice of the national courts—by no means wholly consistent, by 1909—he ascribed 'chiefly,' and very strangely, to the malign agency of a single judge, a judge long since dead, of whom he very evidently did not approve: Justice Joseph Story, who had written the Court's famous opinion in *Swift v. Tyson*, in 1842. For Professor Gray, very ob-

of his account. As for the decision itself the author has a great deal to say. Let the following suffice for the moment: ⁶¹

So, had Justice Brandeis, in the *Erie* case, only taken the trouble to read the Constitution, or even the opinion of his great predecessor, in *Martin v. Hunter*, he would have undoubtedly have been saved from the grievous error he committed. But like Justice Holmes before him, he felt a high certitude about the Constitution and did not take this trouble; and the Supreme Court, in consequence, took the final step in its strange declension from its plainly granted position as the supreme and general juridical head of the country.

...

And since the new rule of decision adopted by the Court was one totally irreconcilable with its own Constitutional position as the nation's general juridical head, the decision stands revealed, both in its manner and in its substance, as one of the most grossly unconstitutional governmental acts in the nation's entire history. How many millions of dollars, in money and other property, are now in hands other than they would have been, had the Court's unwarranted decision not been made, it is utterly impossible to say. But it is perfectly safe to say that the total must be enormous.

Next comes a discussion of the historical background of judicial review⁶² and "Judicial Review in the Constitution."⁶³ Professor Crosskey's conclusion as to what the Constitution provides with respect to this matter is as follows: ⁶⁴

So, taking into account all the several kinds of evidence thus far examined, the situation seems very clear: judicial review

viously without any real knowledge of the subject on which he had assumed to speak, apparently imagined that Justice Story had originated the practice to which he objected, and originated it in the case in question.

"The utter folly of such a view will be apparent to all who read this book; but even in the absence of knowledge of the true genealogy of *Swift v. Tyson*, the superficial character of the views expressed in *The Nature and Sources of the Law* would seem to have been pretty obvious."

⁶⁰ *Id.* at 907: "And to the document [the Constitution] that was the test of certainty on the matters upon which he spoke, Justice Holmes, like the 'accomplished and able writer' he admired, paid no attention at all. Instead, he relied upon books, and theories of his own, as to 'the nature and sources of the law,' and, in consequence, sowed the first seed, in 1910, of the most colossal error the Supreme Court has ever made."

⁶¹ *Id.* at 915, 916.

⁶² *Id.* at 938.

⁶³ *Id.* at 976.

⁶⁴ *Id.* at 1007.

was not meant to be provided generally in the Constitution, as to acts of Congress, though it was meant to be provided generally as to the acts of the states, and a limited right likewise was intended to be given to the Court, even as against Congress, to preserve its own judiciary prerogatives intact.

This conclusion is reached after a careful analysis of the pertinent provisions of the Constitution. In this connection, the author's interpretation of the Supremacy Clause⁶⁵ is a real shocker. The crucial words are "which shall be made in Pursuance thereof." We have all been taught what those words are supposed to mean, but the real meaning is quite different from that. The "simple, straightforward view"⁶⁶ of the Supremacy Clause is that the Constitution itself, acts of Congress made in pursuance of the Constitution — not some other constitution, as, for example, the old Articles of Confederation — and treaties made under the authority of the United States — that is to say, including treaties made before the adoption of the new Constitution — are to be the supreme law of the land: the old common law rules, almost universally recognized as "laws of the United States" in the eighteenth century, are not to be part of the supreme law. "In Pursuance thereof," in short, does not mean "in accordance with" as we have been taught to believe, but rather "in consequence or prosecution of," the usual meaning of the phrase in the eighteenth century.⁶⁷ The Supremacy Clause, which has been called the "heart of the Constitution," as indeed it is, reads as follows:⁶⁸

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

⁶⁵ U.S. CONST. ART. VI, § 2.

⁶⁶ CROSSKEY, *op. cit. supra* note 1, at 1000.

⁶⁷ *Id.* at 991.

⁶⁸ U.S. CONST. ART. VI, § 2.

In view of the plain meaning of this emphatic provision it seems farcical that any petty state judge, even a justice of the peace, should think that he had the right and the power to declare an act of the Congress of the United States unconstitutional. Yet so it has been — often with the enthusiastic approval of many members of the legal profession.⁶⁹

The last major portion of the text deals with the Fourteenth Amendment.⁷⁰ The most important conclusion set forth by the author in this area is that Justice Harlan⁷¹ was right about the Fourteenth Amendment and that the Supreme Court and certain scholars are wrong;⁷² in other words, the first section of the Fourteenth Amendment does indeed incorporate the Bill of Rights. This portion of the book is probably of greater general interest than any other part, but this review will not attempt to give further details. Every

⁶⁹ Judicial review is further discussed in Chapter XXIX, entitled "Judicial Review in the Federal Convention and the First Congress: Herein, also, of *Marbury v. Madison*."

⁷⁰ See Chapters XXXI and XXXII, entitled, respectively, "The True Meaning of the Fourteenth Amendment" and "The Supreme Court's Transformation of the Fourteenth Amendment." The author states, in a footnote, CROSSKEY, *op. cit. supra* note 1, at 1083 n: "The matters dealt with in this and the following chapter are very simple and very obvious. Nevertheless, they are matters which still divide sharply the Justices of our highest court, as may readily be seen by reference to the recent case of *Adamson v. California*, 332 U.S. 46 (1947). And this being seen, the reasons for all the detailed explanation and analysis in this and the following chapter will no doubt be understandable to any reader who might otherwise wonder why such simple subjects are treated herein at such great length."

⁷¹ See Justice Harlan's dissenting opinions in the Civil Rights Case, 109 U.S. 3, 26 (1883); *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Twining v. New Jersey*, 211 U.S. 78, 114 (1908).

⁷² The notes contain many strictures on judges and scholars. The last note on page 1381 is given as an example, CROSSKEY, *op. cit. supra* note 1, at 1381 n. 11: "Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STANFORD LAW REVIEW, 5 (1949); see, also, Morrison, *The Judicial Interpretation*, *ibid.*, 140. Entirely apart from questions of the adequacy, and of the handling, of the evidence which Mr. Fairman presents, it is to be remembered that a recurrence to evidence which of the sort he presents, is illegitimate in the case of a provision, like the first section of the Fourteenth Amendment, which is clear in itself, or clear when read in the light of the prior law. It is doubly illegitimate when it is remembered that most of what the first section of that amendment requires, was also required by Amendments II-VIII. *Cf.*, discussion herein in chapters xxx and xxxi. Mr. Fairman apparently forgets that the ultimate question is not what the legislatures meant, any more than it is what Congress or the more immediate framers of the amendment meant: it is what the amendment means. *Cf.*, Holmes, *The Theory of Legal Interpretation*, 12 HLR, 417 (1899)."

reader of these lines is urged to go to the book itself at the earliest opportunity.

There are several appendices, in which a number of documents are reproduced, including the Articles of Confederation and the Constitution. One very interesting document is the letter of the President of the Federal Convention (George Washington), dated September 17, 1787, to the President of the Congress, transmitting the Constitution, in which the following statement is made: ⁷³

In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence.

It seems quite evident that Washington did not think that States' Rights was the greatest interest of every true American!

The second volume also contains the notes to the text of both volumes as well as a good index.

II

No attempt has been made to conceal the present reviewer's enthusiasm for Professor Crosskey's work. On the basis of what has already been published it seems that Professor Crosskey's view of the Constitution is the correct one, but it should be remembered that the first two volumes are a mere fraction of the projected work, and it seems safe to assume that the succeeding volumes will confirm what has already been said. The author does not state how many more volumes will be necessary to set forth what he has to say about politics and the Constitution in the history of the United States, but he surely contemplates producing more than two or three additional volumes if he continues to canvass the materials in the thorough fashion of the first two volumes. While there

⁷³ CROSSKEY, *op. cit. supra* note 1, at 1234.

are numerous excursions and digressions in the present set that take the reader up to present-day events, on the whole, these first two volumes present primarily those materials that show what the Constitution by its very language said and was intended to say to the people of the United States when it was first brought forward for their consideration and adoption. Again and again the author indicates that his discussion of what was said and done in the Federal Convention and what happened in the ratification campaign will appear in subsequent volumes. Many volumes, it would seem, will be required for consideration of the fateful politics of the pre-Civil War years, Lincoln's administration and the reconstruction era. Then, many more will be required to bring the story down to date. It is a stupendous task, which it is hoped the author will be spared to complete. Whether or not the work is ever completed, however — indeed, in a sense it never can be — the work as it stands today is the prime work on the Constitution, superseding all others. Whatever has been written or said about the Constitution must now be reexamined and revised to see how well or how ill it accords with what Professor Crosskey has written. Most of what has been said or written in the past is, to say the least, very misleading. No course in constitutional law in the future will be sound without abundant references to Professor Crosskey.

Of course, it would be unrealistic to expect that the teaching of constitutional law, let alone the practice thereof by the legal profession or expounding thereof by the Supreme Court, will be transformed overnight because of the appearance of any book, however sound and true it may be. Truth is great and will prevail, but when? Two thousand years have not been enough for Truth Itself. One cannot, then, be very sanguine about our poor mundane truths. In fact, if Professor Crosskey's book receives one-tenth of the attention which it deserves, it will stir up some very unholy opposition. His severe strictures respecting men in opposing camps as

regards interpretation of the Constitution will antagonize many. He roundly condemns American legal scholarship in the field of constitutional law.⁷⁴ He is at odds with the historians. He does not spare the reputations of many revered jurists. Perhaps unintentionally he will antagonize some groups,⁷⁵ but he is certainly prepared for the onslaughts of the States' Rights contingent that we seem to have always with us. He throws down the gage to that group in the following language: ⁷⁶

The stock argument is that preservation of "States' Rights" to regulate intrastate commerce, and also to do many other things, is necessary for the preservation of American liberty. The connection between "States' Rights" and American liberty is, however, never explained. And the truth is that "States' Rights" have never, at any time in our history, stood for liberty. Instead, in the beginning, when the Constitution was drawn, "States' Rights" stood for the "vested rights" of a small and vociferous group of local politicians who had crept into power in certain of the states while Washington and thousands of other men had been in the army fighting for American liberty. "States' Rights" also stood, at that early day, for the "vested rights" of New York and certain of our other states to collect their governmental expenses, in the form of a customs impost, from their neighbors; and they stood at that time, or a little earlier, for the "vested rights," principally of certain of our Southern states, to land claims absorbing virtually the entire western country, which had been obtained from Great

⁷⁴ *Id.* at 1170, where the author makes the following interesting observation: "For, with the actual provisions of the Constitution, and the pressure of politics, in coincidence, the normal expectation would surely be that the Court's theories would tend gradually to shift back to a rational congruence with the document it is sworn to uphold."

"That this has not occurred is undoubtedly to be explained by the poverty of scholarship in the field, and the consequent miseducation that Americans, and particularly lawyers, have long received in the subject. Thus, of all the misconstructions notified in the foregoing pages, only those relating to the Fourteenth Amendment, and not always all of these, are commonly recognized and treated, in the conventional scholarly literature on constitutional law."

⁷⁵ This reviewer wishes that Professor Crosskey had used a more accurate expression on pages 145 and 478 than "Romish" clergy or church. On the latter page he seems to betray an unfortunate anti-Catholic bias, particularly where he states: "when, fortunately for England, Mary died, in 1558, it therefore became possible for her successor, Elizabeth, to confirm the incorporation and yet turn it to the support of the English, rather than the Romish, church." No Catholic can read such lines without a feeling of sadness.

⁷⁶ CROSSKEY, *op. cit.* *supra* note 1, at 47-8.

Britain, in consequence of the exertions of all the states, by the peace of 1783. At that time, few Americans were so naive as to believe that "States' Rights" stood for liberty. And so, the Federal Convention went directly to the people when it sought, by the Constitution, in very large measure to abolish "States' Rights." At that time, too; [*sic*] and still more, a little later; [*sic*] and from then on, down to the Civil War, "States' Rights" stood for the right of a small minority of the people of our Southern states to continue the institution of human slavery. And after the Civil War, "States' Rights" came gradually to stand for lawlessness in business. For, by an adroit playing-off of "States' Rights" against the nation, and national rights against the states, both state and national regulations of business could, as a practical matter, largely be evaded; and practices became possible in the American business world, which never ought to have been tolerated and would, presumably, not have been tolerated, but for the Supreme Court's paralyzing theories of the Constitution.

The issue, then, in the controversy over "States' Rights" and the national commerce power is not an issue of liberty. It is an issue solely of effective government. It is whether we shall have in this country, over the affairs of commerce, a government able to bring to a point the considered sentiments of the American people; to formulate policies on the basis of such sentiments; and to try out the policies so formulated with a minimum of expense, and a minimum of delay, in such a way as to determine whether the policies work and should be retained, or do not work and should be discarded in favor of something better.

It will be very interesting to watch the reactions from various quarters to this book. Ridicule will no doubt be heaped upon the author and those who will agree with him. In the present era of the Great Repression, as Professor John P. Frank calls it, one may expect much worse.

Despite all hostile clamor, however, it really seems inconceivable that this great book will not have very soon a tremendous impact on the constitutional development of the United States. Inevitably, it would seem, someone will cite this work in a brief before the Supreme Court. Soon, let us hope, the members of the Supreme Court will all have read the work themselves. Perhaps some, or all, of them will be

convinced of the accuracy of what Professor Crosskey has to say. Perhaps members of Congress will also read and be converted. Conversion will be hard for those who have been vociferous of late about what they call constitutional government. Professor Crosskey demonstrates that they just do not know what they are talking about.

III

So many of us have been taught or have come to accept the dogma that the Constitution is what the judges say it is, that it is difficult to get back to what is undoubtedly the correct view, namely, that the Constitution is what it says it is. That is the great fundamental teaching of the first two volumes of Professor Crosskey's book. It is the Constitution that the judges and others are sworn to uphold, not what the Supreme Court says, or what Professor Crosskey says either. To make his point as telling as possible the author quotes at the beginning of each volume a wise saying of Justice Holmes: "We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."

This saying succinctly summarizes the method of the two volumes. From them the reader may learn not what Madison meant but what the actual words of the Constitution meant to the people of the United States when they ordained and established the Constitution.

The author points out that even today this sound approach to the Constitution is occasionally recognized in high places. Justice Frankfurter, for example, has said that on important issues of constitutional law the Constitution is, and must be, "the ultimate touchstone."⁷⁷ In a recent famous case, *Zorach v. Clauson*,⁷⁸ Judge Desmond of the New York Court of

⁷⁷ *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491 (1939).

⁷⁸ 303 N.Y. 161, 100 N.E.(2d) 463 (1951).

Appeals, concurring, had occasion to remark that the constitutional provision invoked by the petitioner, the First Amendment, was not quoted in his brief and the judge stated that the amendment was one "lavishly alluded to but seldom quoted."⁷⁹ The same might be said for many other provisions of the Constitution, particularly those that have been quoted in this review. It is hoped that the judicial movement of succeeding years will be one "back to the Constitution." There can be little doubt that such a movement would redound to the general welfare of the people of the United States.

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⁷⁹ *Id.*, 100 N.E.(2d) at 470.

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